Supreme Court, U.S.
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90-820

Case No. _____

In The

Supreme Court of the United States

October Term 1990

Jack R. Whitehorn and
Mary Ruth Whitehorn

Petitioners

vs.

Margaret H. Murphy,
Law Firm: Smith, Gambrell & Russell and
Robert M. Garstin

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the doctrine of *res judicata* can be applied, whereas the court being sanctioned as the court rendering final judgments to effect *res judicata*, expressly abdicated jurisdiction over the meritorious issues involved in this instant complaint?

2. Whether the "property rights" recovered by "*settlement*" as entered by court order, being crux of complaint, constitute a final decision on the merits for application of doctrine of *res judicata* in the instant case?

3. Whether the doctrine of *res judicata* can withstand the constitutional protection of "property rights" as granted by the Fifth Amendment and protection thereof as determined by this Honorable Court?

4. Whether, after a court has dismissed a complaint for improper service, the same court can then make findings of fact and conclusions of law on the complaint dismissed?

5. Whether in the public interest, relating to administrative agency law (FCC), as there is no case precedent to the issues herein, this case should be published for benefit of said agency for protection of infringement on valid broadcast license holders?

PARTIES OF INTEREST

Persons interested in the outcome of the petition herein are:

1. Trial Court; United States District Court, District of Nevada. Judge Philip M. Pro.
2. United States Bankruptcy Court for the District of Nevada. Bankruptcy Judge Robert Clive Jones.

3. Reviewing Justices of the United States Court of Appeals for the Ninth Circuit.

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DECISION BELOW AND JURISDICTION INVOKED

The August 21, 1990 decision of the United States Court of Appeals for the Ninth Circuit in the instant cases No. 89-15630 and No. 89-15767 is unreported by express memorandum of the court.

The trial court, the United States District Court, District of Nevada, decision in Court of Appeals Case No. 89-15630 was entered April 26, 1989 and is unreported.

The trial court, the United States District Court, District of Nevada, decision in Court of Appeals Case No. 89-15767 was entered June 6, 1989 and is unreported.

Jurisdiction by writ of certiorari granted upon petition is vested under Title 28 U.S.C. § 1254.

No extension of time has been requested or granted to file the instant petition for a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

This case involves the doctrine of *res judicata*.

Claim preclusion applies to order or judgment when prior judgment is valid in that it was rendered by a court of competent jurisdiction and in accordance with requirements of due process, judgment was final and on merits.

U.S.C.A. Constitutional Amendments 5, 7 and 14. (Appendix 12)

This case further involves the following statutes:

U.S.C., Title 47 § 151. (Appendix 13)
U.S.C., Title 47 § 301. (Appendix 13)
U.S.C., Title 47 § 303. (Appendix 13)
U.S.C., Title 47 § 309. (Appendix 13)
U.S.C., Title 47 § 310. (Appendix 13)

Federal Communications Rules & Regulations § 73.3540, Applicants for Voluntary Assignment or Transfer of Control. (Appendix 14)

U.S.C. Title 18 § 1001. **Statements or Entries Generally**

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statements or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Title 18, U.S.C. § 1961(1)(d) -- "Any offense involving fraud connected with a case under Title 11." (Appendix 15)

Title 18, U.S.C. § 2516(1)(e) -- "Any offense involving fraud connected with a case under Title 11." (Appendix 15)

Case No. _____

In The

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October Term 1990

Jack R. Whitehorn and
Mary Ruth Whitehorn

Petitioners

vs.

Margaret H. Murphy,
Law Firm: Smith, Gambrell & Russell and
Robert M. Garstin

Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Jack R. Whitehorn and Mary Ruth Whitehorn, petitioners herein, respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit entered in the above entitled cases on August 21, 1990.

STATEMENT OF THE CASE

On July 1, 1988 petitioners' complaint was filed in the United States District Court, District of Nevada. The basis of jurisdiction, diversity under 28 U.S.C. § 1332 - 28 U.S.C. § 1334(a)(d), a diversity based on bankruptcy fraud. The said complaint set forth jury demand. The United States Court of Appeals for the Ninth Circuit reviewed the district court's summary judgments pursuant to Title 28 U.S.C. § 1291. (Appendix 1) No other court of appeals has decided a case that presents the precise issue of the case herein. (Complaint at Appendix 4.) This instant case is "unique." The prosecution of a case of this nature is unprecedented.

The instant complaint, *inter alia*, sets out as the principal cause of action "fraudulently transferring a Federal Communications Commission (FCC hereinafter) broadcast license without any judicial power" (*i.e.*, third party injury by deprivation) and denying petitioner Jack Whitehorn's "property rights" decreed by "*settlement*" and an order, approving the contract, entered January 26, 1984, by a court of competent jurisdiction. Said contract was protected by the United States Bankruptcy Court for the District of Nevada pursuant to 11 U.S.C. § 362 (automatic stay effective October 6, 1980 *infra*). Further, the constitutional privilege of the Fifth Amendment, providing that no person shall be deprived of life, liberty or property without due process of law is applied.

The respondents, in all pleadings in lower courts, have not at any time disavowed petitioners' common sense and legal rationale underlying the claim of "Fraud of the FCC licenses," but assert only improper service and the doctrine of *res judicata* barring prosecution of said complaint. Summary judgment was granted on said premise. (Appendices 2 and 3)

The respondents cleverly manipulated the WFDR, Inc. bankruptcy case commenced May 9, 1980 in the United States Bankruptcy Court, Northern District of Georgia, Newnan Division and petitioners' bankruptcy case commenced October 6, 1980 in the United States Bankruptcy Court, District of Nevada to the magnitude of asserting that the proceedings in said bankruptcy cases included or should have raised the instant "fraud" complaint to serve their purpose of defeating said complaint by applying the doctrine of *res judicata*. Respondents contrived perception of said complaint is without legal merit or any judicial authority. Moreover, the petitioners are, through economic necessity, pro se litigants. Respondent Murphy is a lawyer, and now a bankruptcy judge; the respondent law firm and respondent Garstin are implicated with prior bankruptcy cases. These facts imply that petitioners' factual writings put before the lower courts were considered on principles of *confrere*. Hence, the lower court depicted the said complaint as frivolous and would entertain no petition for rehearing. Additionally, the court set out further litigation of the WFDR's sale will result in sanctions. "Sanctions are inappropriate if the party pursuing the claim has a nonfrivolous argument for avoiding *res judicata*"; *see International Ass'n of Machinists v. Boeing Co.*, 833 F.2d 165, 172 (9th Cir. 1987). The instant action is clearly nonfrivolous and crucially summons this Court's guidance![1]

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[1] The complaint at bar is not as the lower court characterizes, "further litigation of the WFDR's sale." The complaint (at Appendix 4) is a straightforward "fraud" claim of "Property Rights." Petitioner Jack Whitehorn instituted a proper adversary proceeding (discussed in detail *infra*) consistent with Bankruptcy Rules 7001 through 7003, against John F. Whitehorn. Said proceeding was prosecuted to finality with a final order "*settlement*" entered January 26, 1984 in the United States Bankruptcy Court, Northern District of Georgia, Newnan Division. The Court noted in the order the preference action was in favor of petitioner Jack Whitehorn as set out verbatim in the instant

The lower court's illogical deduction that the instant complaint is "further litigation of the WFDR's sale" is most confusing, contrary to the United States Constitution, directly conflicting with other United States Court of Appeals adjudications and not uniform to its own published precedent cases, as well as Federal statutes enacted by Congress and rules of a Federal Administrative Agency. The litigation is at a determining conclusiveness and beseeches this Honorable Court's supervision.

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complaint. The Court found the action had become "*moot*" under the terms of the "*settlement*." "It is well settled that the dismissal of a case because it is "*moot*" does not lay a basis for the application of *res judicata*"; *N. Sims Organ & Co. v. SEC*, C.A. 2d, 1961, 293 F.2d 78, 81-82 certiorari denied 82 S. Ct. 440, 368 U.S. 968, 7 L. Ed. 2d 396. Further, it is universally acknowledged that the parol evidence rule is not a rule of evidence at all, rather it is a rule of substantive law founded upon the substantive "**rights**" of the parties; *Bakee v. Rapport*, 453 F. 2d 1141 (1st Cir 1972); *Centronics Financial Corp. v. El Conquistador Hotel Corp.* 573 F.2d 779,782 (2d Cir. 1978); *Betz Laboratories, Inc. v. Hines*, 647 F.2d 402, 405 (3rd Cir. 1981); *Rock-Ola Mfg. Co. v. Wertz*, 282 F.2d 208 (4th Cir. 1960); *Southern Stone Co., Inc. v. Singer*, 665 F.2d 698, 701 (5th Cir. 1982);*Nutrena Milla, Inc. v. Yoder*, 187 F. Supp. 415 (N.D. Iowa 1960), affirmed 294 F.2d 505 (8th Cir. 1961); *Vickery v. Fisher Governor Co.*, 417 F. 2d 466,468 (9 Cir. 1969); *American Crystal Sugar Co. v. Nicholas*, 124 F.2d 477 (10th Cir. 1941). The agreement resolved the ownership rights which had been the subject of legal battles for some four years. The "*settlement agreement*" is a contract; *Clausen Co. v. Daynatron/Bondo Corp.*, 889 F.2d 459 (3rd Cir. 1989). A contract is an asset even though the trustee may not be able to assume or assign it under 11 U.S.C. § 365; See *In re Computer Communications, Inc.*, 824 F.2d 725, 16 B.C.D. (9 Cir. 1987). The contract clause of the Constitution bars impairment of rights of the parties if substantial. A change in how remedies are utilized is not a major impairment; *Honeyman v. Hanan*, 302 U.S. 375, 58 S. Ct. 273, 82 L.Ed 312 (1937). An additional affirmation of said "*settlement*" may be found in the trial court's order entered July 31, 1987 Appendix 5).

The respondents' characterization of the instant complaint is misleading and irrelevant. The respondents allege and the lower court affirms that the complaint seeks damage for loss of the WFDR stock. The respondents' analysis of said complaint is ungrounded. Respondents fuse as one, the corporate WFDR stock, the FCC broadcast licenses and the corporate assets and claim *res judicata* because, as respondents phrase it, those claims have been repeatedly litigated to finality in earlier judicial proceedings in the WFDR, Inc. bankruptcy case as well as petitioner's bankruptcy case. This fiasco is the crux of the necessity of this Court's guidance. Petitioner's holdings have been so confused by respondents in their pleadings, the matter has reached a point of being out of touch with reality. Respondents and lower court's characterization of the case herein is not pursuant to the actuality of judicial decrees of (1) corporate stocks,[2] (2) corporate assets[3] and the leading issue complained for (3)

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[2] This Court in case No. 88-647 cert. denied -- U.S. --, 109 S. Ct. 567, 102 L. Ed. 592(1988) (by denying certiorari, affirmed the July 31 1987 United States Bankruptcy Court, Northern District of Georgia, Newnan Division order entered July 31, 1987 (Appendix 5) wherein the trial court with compelling clarity interpreted the corporate stock in the corporation whose corporate shares were cancelled by said court as "Property Rights" preserved by ownership. The said corporate shares, as evidenced by "certificates of interest," were issued in place of actual stock certificates. The "Property Rights" are well defined in *Evans v. Stockton & Hing, (In re Southwest Restaurant Systems)*, 607 F.2d 1243 (9th Cir. 1979) cert. denied 444 U.S. 1081 (1980). Bankruptcy proceedings are subject to the Fifth Amendment; *United States v. Security Indus. Bank*, 459 U.S. 70, 75 103 S. Ct. 407, 410, 74 L. Ed. 2d 235 (1982). As a general proposition, even Congress is not free to give away Constitutional rights.

[3] "Corporate Assets": In the context of bankruptcy, in general, even a corporation whose shares (as in this matter) are owned by a single person or other entity is a separate and different entity. The owner is not a party to the corporate bankruptcy proceedings; *In re Johnie T. Patton*, Inc., 12 B.R. 470 (Bkrtcy D. Nev. 1981). What are assets of a

FCC broadcasting licenses.[4] Applying the doctrine of *res judicata* to the instant complaint is as unmixable as oil and water and as self-contradictory as "guilty innocence."

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corporate or individual debtor estate? Title 11 U.S.C. § 541(a)(1) provides regardless of location, property of the estate is comprised of "all legal and equitable interests of the debtor as of the commencement of the case. Under the Code as under the act, the question of what is "Property" is a federal question; *In re Ford*, 3 B.R. 559 B.C.D. 202 (Bkrtcy D. Md. 1980), affirmed 638 F.2d 14 (4 Cir. 1981). A district judge noted that property of the debtor was under jurisdiction of the bankruptcy court but that until he determined whose it was, it was not property of the debtor; *National Co-Op Refinery Ass'n v. Rouse*, 60 B.R. 857 (D. Colo. 1986). In this case the stock or "property rights" were not decided or "*settled*" until January 26, 1984 *supra*, *res judicata* precluded.

[4] The "true owner of said property (respondents not parties to dispute) should not be bound by the efforts of another who may lack any genuine interest in the dispute"; *Dull v. Blackman*, 1898, 18 S. Ct. 333, 335, 169 U.S. 243, 248, 42 L. Ed. 733. *In Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984), this Court set forth the general principles to be applied when federal courts review an agency's interpretation of the statute it implements. This Court said: "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that it is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the Court determines Congress has not directly addressed the precise question at issue, the Court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based upon a permissible construction of the statute." Id at 842-843, 104 S. Ct. at 2781-82. (Footnotes omitted.)

The following is express pursuant to Title 47 § 301 Congress has power to grant and deny broadcasting licenses and to delete existing stations; *Red Lion Broadcasting Co. v. F.C.C.*, Dist. Col. 1969, 89 S. Ct. 1794, 395 U.S. 367, 23 L. Ed. 2d 271.

Addressing the "ownership of property rights in the entity of WFDR, Inc." and extinguishing *res judicata*: "The *res judicata* effects of a federal court decree . . . are governed by federal decisions especially since the decision "involved rights protected by the Constitution of the United States"; *Gunter v. Atlantic Coast Line R.R.*, 1906 26 S. Ct. 252, 259, 200 U.S. 273, 290-291, 50 L. Ed. 477.

The respondents filed a voluminous amount of papers (irrelevant, based on the comprehensive facts of the case at bar) -- partially, if not the entire record of the WFDR, Inc bankruptcy case. They further devised and filed with the district court *animo*, a defective proposed order which the said court used substantially. These actions were committed with only one scheme to accomplish: Simply to create a maze of such apex that the district court would trust the respondents' integrity in their noble profession as lawyers -- and placing full confidence in their opinion -- would grant their motion(s) for summary judgment as affirmed by the appeals court.[5]

Title 47 § 301 provides: "It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission . . . and no such license shall be construed to create any *right, beyond the terms, conditions and periods of the license* . . . . (Italics supplied.)

Title 47 § 309(b)(2) provides: "Neither the license nor the *right granted thereunder shall be assigned or otherwise transferred in violation of this chapter.*" (Italics supplied.)

[5] The petitioners showed the WFDR stock "property rights" as litigation in progress as to ownership question in petitioners' schedule of assets filed with petitioners' bankruptcy court. The debtors chose in action become assets of the estate: *Hester v. Farmers Home Admin.*, 49 B.R. 593 (E.D. Mo. 1985); *In re Bevier*, 12 B.R. 75, 8 B.C.D. 80 (Bkrtcy D.S.D. 1981). The FCC retains continuing jurisdiction over broadcasting license, despite chapter 11 bankruptcy case; see *LaRose v. FCC*, 494 F.2d 1145 (D.C. Cir. 1974). Title 47 § 303 provides: the power to license a radio station or to transfer, assign or annul such

The United States Bankruptcy Court, Northern District of Georgia, Newnan Division administering the WFDR, Inc. case enacted, *ex parte*, the authority that every court has the jurisdiction to determine its own jurisdiction. The said court, by order entered March 16, 1981 (at Appendix 6), expressly rejected jurisdiction over FCC questions of law in said bankruptcy cases. The Court said at page 5, ¶ 2 of said order: "*The final objection to the sale is based on the premise that the sale violates the rules and regulations of the FCC. While the decision as to whether or not the sale does violate the rules of that body is not for this court.*" (Italics added.) Further, *In re D. H. Overmyer Telecasting Co., Inc.*, 35 B.R. 400 (Bkrtcy 1983), the court found the corporate debtor's FCC license was not property of the estate.

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licenses is within the exclusive jurisdiction of the Commission: *Johnson V. Radio Station WOW*, 1944, 14 N.W. 2d 666, 144 Neb. 406 reversed on other grounds 65 S. Ct. 1475, 326 U.S. 120, 89 L. Ed. 2092, mandate conformed to 19 N.W. 2d 853, 146 Neb. 429, motion denied 66 S. Ct. 11, 326 U.S. 804, 7 L. Ed. 2d 489.

Murphy testified no court approval was sought nor were any orders entered by a court of competent jurisdiction (more specifically, the Georgia Bankruptcy Court administering the WFDR, Inc. case) to move WFDR, Inc. debtor-in-possession back to entity WFDR, Inc. Further, Murphy submitted a fraudulent writing before the FCC for the purpose of assignment and transfer of petitioner's property rights. Murphy further testified under oath that WFDR, Inc. was liquidated for cash, then under oath testified WFDR, Inc. entity continued in existence. Murphy then admitted and testified under oath she appeared before the United States Bankruptcy Court Northern District of Georgia, Newnan Division, the court administering the WFDR, Inc. case and plead that the entity of WFDR, Inc. would cease to exist. As set out *supra* Murphy and Law Firm: Smith, Gambrell & Russell appeared as counsel of record and estate administrator in the WFDR, Inc. bankruptcy case. Accordingly, *res judicata* does not aply when the parties appear in one action in a representative capacity and in a subsequent action in an individual capacity; *Clark v. Amoco Production Co.*, 794 F.2d 967, 973 (5th Cir. 1986).

Dismissal of a claim because of jurisdictional limitation is not res judicata; *Lindy v. U.S.*, Ct. CI. 1976, 546 F.2d 371, 373.

The instant complaint (at Appendix 4) recites claims for relief in that an adversary proceeding filed in the petitioners' bankruptcy case, District of Nevada, on December 8, 1980 subsequently transferred to the United States Bankruptcy Court, Northern District of Georgia, Newnan Division and sought 100% of the outstanding stock of WFDR, Inc. The recital clearly specified the court's final judicial determination of said adversary proceeding entered January 26, 1984, determining petitioner Jack Whitehorn as owner of 100% of WFDR'S corporate stock free and clear of all claims, pursuant to the preference action becoming "*moot*" under the terms of the "*settlement*." This Court has decreed, the bankruptcy estate consists of all property of the debtor including not only tangible personal property, but also intangible property and *causes of action*; *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 103, S. Ct. 2309, 76 L. Ed. 2d 515 (1983). (Emphasis added.) The instant complaint at ¶ 6-7 sets out an adversary proceeding, "Complaint to Compel Turnover of Property" was in progress at time of filing the cause of action at hand. Further, the complaint stated the fraud claims made were discovered while researching and deposing certain defendant as well as emphatically disclosing, "If Plaintiffs fail in said turnover proceeding (of the actual stock certificates), there is no dispute that the Plaintiffs/Debtors-in-Possession' estate has all the rights that free and clear titled ownership of the stock gives said estate pursuant to "*settlement*" and entered by court order."

Moreover the complaint sets out respondents "by fraud" interfered with petitioner's "property rights" by appearing before the FCC and having a valid FCC

broadcasting license assigned and transferred without any judicial power.

Petitioners, pursuant to Fed. R. App. P. 44 notified lower court of constitutional question pursuant to order entered August 31, 1989. (Order at Appendix 7)

The respondents alleged the doctrine of *res judicata* estops all claims of petitioners. Additionally, in lower court case No. 89-15630, respondents allege improper service. The appeals court affirmed. Concerning improper service, petitioner (recognizing our incompetent ability in contrast to learned legal scholars) respectfully presents these creditable queries: (1) How can any judge grant relief if the parties are not properly before the court? (2) As service is an integral part of the process, how can a court make findings of fact and conclusions of law as to the substantive cause of action if the action is dismissed and the parties not properly before the court? The case cries for this Court's direction.

The appeals court affirmed improper service in case No. 89-15767. Respondent Garstin was hand served and has not contested the service process. A clear *erratum* of the lower court.

ARGUMENT FOR THE ALLOWANCE OF THE WRIT

Petitioners herein will lay out the unmitigated facts surrounding the instant complaint in common layman's terms. Economic necessity caused by the said complaint leaves petitioners with no legal counsel so we must proceed pro se.

As is often the case, a most appropriate starting point is to look to this Honorable Court for superior guidance. Petitioners are not arguing the WFDR, Inc. case or whether the bankruptcy court's factual

determinations were correctly made. But historic traditional law allows for these petitioners' day in court; *Ashley v. City of Jackson*, 1983, 104 S. Ct. 255, 257 464 U.S. 900, 78 L. Ed. 2d 241. Likewise, legislative and administrative tribunals are permitted to decide matters involving "public rights," Congress may elect the forum; *see Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 15 L. Ed. 372 (1855).

Petitioner Jack Whitehorn had part ownership and subsequently 100% ownership and was president and sole director of WFDR, Inc. for 21 years. The building of a small radio broadcast business into a multimillion dollar property caused destructive health problems which resulted in open heart surgery in 1977.

On or about March 28, 1980, petitioner Jack Whitehorn entered into a stock option agreement with blood brother John F. Whitehorn, believing (under medication) the document was a "trust" for petitioner Jack Whitehorn and his family's benefit.

After petitioner disavowed the option agreement on or about May 8, 1990 by mailgram, respondent Garstin acted on authority of holder of said option which included a proxy (an irrevocable proxy, contained in the body of the option and not valid pursuant to Georgia law). Garstin filed a voluntary chapter 11 case in the United States Bankruptcy Court, Northern District of Georgia, Newnan Division on May 9, 1980. The bankruptcy court upheld the said proxy for purpose of respondents' filing said bankruptcy case. Garstin claimed to be elected to office of president and sole director by proxy holder.

According to information from sworn testimony, the option holder removed himself and refused to have anything else to do with the property on or about December 1, 1980. This left the respondents in the

corporate case to continue to operate the business for personal fraudulent enrichment. The said respondents had no ownership interest in said property. (Murphy Deposition record below) The respondents were never sanctioned by owner/petitioner Jack Whitehorn to serve in any capacity for the corporate property (which has no bearing on this case). More important to the case herein respondents did not serve in any representative capacity for petitioners over any property owned or recovered by "individual" Jack Whitehorn in petitioners' personal bankruptcy case.

Ownership or "rights" in property must be resolved by adversary proceeding, not by a plan or reorganization as respondents assert; *see In re Commercial Western Finance Corp.*, 761 F.2d 1329, 13 B.C.D. 352 (9 Cir. 1985). This petitioners' "property rights recovery" was done in the proper legal contex. (See July 31, 1987 order at Appendix 5.) This Court has held stock (certificate of interest in this instant case) is "property" for purposes of 11 U.S.C. § 1129(b)(2)(B)(ii) even if the firm has a negative worth; *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 208, 108, S. Ct. 963, 969, 99 L. Ed. 2d 169 (1988). All adversary proceedings interrelated to respondents' *res judicata* claims are discussed in detail *infra*.

The petitioners attempted to use the recovered stock or rights therein to reorganize their personal estate. Respondent Murphy objected. The Nevada Bankruptcy Court (petitioners' commencement court) insisted upon petitioners having physical "stock certificate in hand" and instructed petitioners to file the "Complaint to Compel Turnover of Property" as discussed herein. The discovery in the said turnover proceeding produced the evidence of "fraud" of "petitioners' property rights" and the instant complaint was filed.

The respondents only defense: "the doctrine of *res judicata*," *i.e.*, all is done, you (petitioners) are not lawyers, you don't know who we are; everything was taken care of in the WFDR case or should have been; we don't want to be bothered with you now.

Respondent Murphy is a chronic liar and the other respondents will forsake any truth in support of her misrepresentations. (Appendix 11/Murphy Deposition below) Respondents bias of *res judicata* is based on rhetoric rather than evidence. The model rules of professional conduct adopted by the House of Delegates of the American Bar Association on August 2, 1983 forbid a lawyer to counsel or to assist a client in conduct that the lawyer knows is fraudulent.

The evidence of wrongdoing is clear, unequivocal, and decisive beyond a reasonable doubt. It is left to the respondents to shoulder, if they can, the burden of proving they were justified in their actions; *Aikens v. Wisconsin*, 1904, 195 U.S. 194, 25 S. Ct. 3, 49 L. Ed. 154. Respondents have not and cannot comply, as clear evidence before the lower court shows:

> 1. The corporate bankruptcy court expressly rejected jurisdiction over FCC matters, the crux of the instant complaint herein; *res judicata* unavailable.
>
> 2. The "property rights" recovered by petitioners were attained by "*settlement*" as fully discussed.[6]

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[6] "*Settlement*" does not constitute a final decision on the merits. A court's order or judgment can never have any preclusive effect on future litigation unless that order or judgment constitutes a final decision on the merits; *see Ashe v Swenson*, 397 U.S. 436, 443, 90 S. Ct. 1189, 1194, 25 L. Ed. 2d 469 (1970); *United States v. United States*

Respondents' motion for judgment on the pleadings and/or for summary judgment was granted predominatly on the grounds that petitioners' complaint is barred by the doctrine of *res judicata*.[7]

Smelting Refining & Mining Co., 339 U.S. 186, 198, 70 S. Ct. 537, 544, 94 L. Ed. 750 (1950); *Jones v. Texas Tech Univ.*, 656 F. 2d 1137, 1141 (5th Cir. Unit A Sept. 1981).

The "property rights" have been moved from the Federal Communications Commission by fraud in direct conflict of Federal statutes. The Fifth Circuit has held congressional intent is vested with an administrative agency to regulate matters in its field; *see In re Braniff Airways, Inc.*, 700 F.2d 935, 10 B.C.D. 933 (5th Cir. 1983), rehearing denied 705 F.2d 450 (5th Cir. 1983). Whatever furthers the statute's primary objective must be the law; *Rodriguez v. United States*, 480 U.S. 522, 525-26, 107 S. Ct. 1391, 1393, 94 L. Ed 2d 533 (1987).

[7] The party moving for summary judgment has burden of informing court of basis for its motions and identifying pleadings and other record evidence which it believes demonstrate absence of genuine issue of material facts. FRCP 56; *Celotex Corp. v. Catrett* 477 U.S. 317, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986). In determining what is a material fact, the court must review the substantive law of the case for identification of which facts are critical and which facts are irrelevant; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). Further, it must appear either upon the face of the record or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there is any uncertainty on this head in the record ... the whole subject-matter of the action will be at large and open to a new contention unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined; *Russell v. Place*, 1876, 94 U.S. 606, 608, 24 L. Ed. 214. (Here the precise point was not involved or determined.)

The standard for judgment on the pleadings is whether the plaintiff is capable of producing any facts in support of his or her claim that would ground relief; *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957). (This has been done.)

The respondents seek to use *res judicata* to camouflage their noninterest in the "property rights" of petitioner by appearing before the FCC without any judicial authority and by fraudulent conduct

Petitioners used this Court's precedent case *Brown v. Felsen*, 442 U.S. 127, 60 L. Ed. 2d 767, 99 S. Ct. 2205 to define and extinguish any relevancy to *res judicata* pursuant to the instant complaint. Respondents Murphy and Law Firm: Smith, Gambrell & Russell lower court case No. 89-15630 choose as their statement of the doctrine of *res judicata* this Court's case *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948) citation omitted; also, Restatement (Second) of Judgments §§ 17-26, 30-33 (1981). This Court cited the said Sunnen case in *U.S. v. Stauffer Chem Co.*, 1984, 104 S. Ct. 575, 579 N.5 464 U.S. 165, 78 L. Ed 2d 388, wherein the Court implied that it may support special rules "in the tax context" that do not have "general applicability outside of that context." The instant complaint "is not a tax preclusion issue." There is no preclusion of an issue that "was not actually litigated"; *Community National Bank v. Fidelity & Deposit Co.*, C.A. 9th, 1977, 563 F. 2d 1319, 1323.

Respondent Garstin lower court case No. 89-15767 chose 5th Circuit Court of Appeals cases, *Nilsen v. City of Moss Point, Mississippi*, 701 F.2d 556, 559 (5th Cir. 1983) (en banc); *Republic Supply Co. v. Shoaf*, 515 F.2d 1046 (5th Cir. 1987) and *Hotel Corp of the South v. Rampart 920, Inc.*, 46 Bankr. 758, 747 (E.D. La.); aff'd 781 F.2d 901 (5th Cir. 1985).

The contentions of the instant complaint and the only vital proposition is the "fraudulent transfer of an

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through groundless writings and execution of certain FCC (standard form) documents having assigned and transferred a *"valid"* FCC broadcast license through manifest deception. The property was obtained by fraudulent misrepresentation; *see Taybor v. Universal Exploration Co.*, 8th Cir. 1931, 48 F.2d 1047.

Deliberate fraud by the transferor in settling litigation with the obliger provides an added reason to deny preclusion; *Welch v. Mandeville*, 1816, 1 Wheat. (14 U.S.) 233, 4 L. Ed 79.

FCC broadcast license" by respondents -- whether the uncontradicted fraud is barred by the doctrine of *res judicata*; whether petitioners' United States Constitutional, Fifth Amendment rights will be subverted by the lower court decrees. The dues process and equal protection clauses apply to all federal operations; *see Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 55 S. Ct. 854, 79 L. Ed. 1593 (1935).

The *res judicata* confusion demands this Court's supervision and here is the basis that will conform to cases cited *supra* by all parties herein and will lay to rest permanently the gratuitous "doctrine of *res judicata*."

Jurisdiction: All pleadings, orders and other documents of record raised by respondents for *res judicata* to be applied were filed in or venue transferred proceedings to the United States Bankruptcy Court, Northern District of Georgia, Newnan Division. In the March 16, 1981 order (at Appendix 6) these petitioners expressly objected to the sale and violation of FCC law as the order recites: "The final ground for objection is that the proposed sale violates the rules and regulations of the Federal Communications Commission." The court overruled petitioners' objection and expressly rejected jurisdiction of FCC law wherein the court proclaimed "The final objection to the sale is based on the premise that the sale violates the rules and regulations of the FCC. **While the decision as to whether or not the sale does violate the rules of that body is not for this court.**" (Emphasis added.) The said order without exception invalidates *res judicata* in this action.

Further, in said order, the court sets out an unconstitutional injunction wherein the Court said: "IT IS HEREBY ORDERED AND ADJUDGED that all parties before the court and who have appeared in this proceeding are permanently restrained and enjoined from

instituting any suit or proceeding before any court or administrative agency." Pursuant to the Uniform Fradulent Conveyance Act § 6(4), a transfer is not made until the debtor has acquired rights in the asset transferred. The act requires the transferor to have rights in the asset transferred before the transfer is made for the purpose of this section. This provision makes clear that its purpose may not be circumvented by notice - filing or recordation of a document evidencing an interest in an asset to be acquired in the future; Cf. Bankruptcy Code § 547(e); U.C.C. § 9-203(1)(c).[8]

The next pertinent entanglement with *res judicata* confusion is to undertake what legal authority has jurisdiction to adjudicate FCC claims.[9]

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[8] In the said order, there is no contention that petitioners did not raise the issue of FCC law, i.e., Rules and Regulations of said administrative agency of the Federal Government. A mandated requirement to invalidate *res judicata* in this instant complaint.

Morever, A court's determination of its own jurisdiction is subject to the principles of *res judicata*; it generally may not be challenged in a collateral proceeding; see *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, U.S. 694, 102 S. Ct. 2099, 2104 N.9, 72 L. Ed. 2d 492 (1982); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 60 S. Ct. 317, 319, 84 L. Ed. 329 (1940). This bar applies whenever the party challenging the judgment has the opportunity to raise the jurisdictional issue, but fails to do so; *Chicot County* 60 S. Ct. at 320.

Further if the first suit was dismissed for ... the want of jurisdiction, ... the judgment rendered will prove no bar to another suit; *Hughes v. U.S.*, 1866, 4 wall (71 U.S.) 232, 237, 18 L. Ed. 303.

The United States Constitution, Amendment 1, guarantees the right to petition the government for a redress or grievances.

[9] Without any equivocation the Federal Communications Commission is not, strictly, a court but it has quasi-judicial powers and its proceedings must satisfy the pertinent demands of due process; Title 47 U.S.C. § 151 et seq.; see *National Broadcasting Co. v. U.S.*, N.Y. 1943, 63 S. Ct. 997, 319 U.S. 190, 87 L. Ed. 1334; *L. B. Wilson, Inc. v. FCC*, 83 U.S. App. D.C. 176, 170 F.2d 793.

The respondents have brought questions as to the ownership or "property rights" of the FCC license which is the complained subject of fraud.[10]

Petitioner Jack Whitehorn owned 100% of WFDR, Inc. stock prior to March 28, 1980. There is no dispute to this fact.

On March 28, 1980 a stock option was executed in favor of blood brother John F. Whitehorn.

On May 9, 1980 WFDR, Inc, respondent Garstin acting as president and sole director elected by option holder, which included a proxy (discussed *supra*), filed

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As set out *supra*, the bankruptcy court that respondents rely on to apply *res judicata* herein, appropriately rejected jurisdiction to FCC matters. Accordingly, issue preclusion could not rest on a finding that the prior court itself recognized was not necessary to its decision; see *Minnis v. U.S. Dept. of Agriculture*, C.A. 9th, 1984 737 F.2d 784, 786 N.1., certiorari denied 1985, 105 S. Ct. 2112, 471 U.S. 1053 85 L. Ed. 2d 477.

[10] "Property Rights" *de jure* is abundantly clear as to the possession of "*valid issued FCC broadcast licenses*." The ownership of property whether the property be real or personal, carries with it the right to exclude others from its possession, use or enjoyment. The right of ownership is a right guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution; see *L. B. Wilson v. FCC*, 170 F.2d 793 (C.A.D.C.). Although a radio broadcasting station license does not under the Communications Act confer an unlimited and indefeasible property right, the right is more than a mere privilege or gratuity; *Communications Act of 1934*, §§ 1 *et seq.*; 301, 309(b)(1,2), 47 U.S.C. §§ 151 *et seq.*; 301, 309(b)(1,2); see *FCC v. Sanders Bros. Radio Station*, 1940, 309 U.S. 470, 60 S. Ct. 693, 84 L. Ed. 869. The FCC license, the subject matter of the instant complaint was "*valid*" at time of fraud. This court has recognized at various points in its opinion the *existence of a private right or interest in a station licenses while his license is outstanding* (italics supplied); see *FCC v. Pottsville Broadcasting Co.*, 1940 309 U.S. 134, 60 S. Ct. 437, 84 L. Ed. 656.

and was granted chapter 11 protection (11 U.S.C. chapter 11) United States Bankruptcy Court, District of Georgia, Newnan Division.

On July 23, 1980 an adversary proceeding was filed in the WFDR, Inc. bankruptcy case No. 80-001367 complaining, *inter alia*, of sale and rightful ownership of all the stock of WFDR, Inc. debtor-in-possession. The said adversary proceeding was styled, *In Matter of WFDR, Inc. Debtor-in-Possession, Jack Whitehorn Plaintiff vs. John F. Whitehorn, Robert M. Garstin and WFDR, Inc. Debtor-in-Possession Defendants.* The said court abstained from hearing said proceeding. (District court order characterized as not prosecuted further.)

Defendant WFDR, Inc. Debtor-in-Possession filed a counterclaim August 18, 1980 (still pending). (See Appendix 8.)

On October 6, 1980 relief was granted for petitioners (11 U.S.C. chapter 11) United States Bankruptcy Court for the District of Nevada, bankruptcy case No. BK-S-80-0936.

On December 8, 1980 an adversary proceeding was filed in the United States Bankruptcy Court for the District of Nevada complaining, *inter alia*, of recovery of 100% of the WFDR stock. Said proceeding was subsequently transferred to the Northern District of Georgia. The proceeding was styled *Jack R. Whitehorn and Mary Ruth Whitehorn Debtor, Plaintiff v. John F. Whitehorn Defendant.* Said proceeding concluded by "*settlement*" as admitted by respondents.

On April 3, 1986, by Court instruction, an adversary proceeding was filed in petitioners' bankruptcy case, being adversary proceeding No. 86-0045 "Complaint to Compel Turnover of Property." The complaint was

styled *Jack R. Whitehorn and Mary Ruth Whitehorn, Debtor-in-Possessions, Plaintiffs v. Margaret H. Murphy and Law Firm: Smith, Gambrell & Russell, Defendants*. The said complaint sought physical turnover of the WFDR stock certificates. The said proceeding was subsequently transferred to the Northern District of Georgia. This court denied certiorari to appeals of trial court order of July 31, 1987. (Appendix 5) Said order did not reject claims to FCC licenses as district court characterizes in summary judgment order. (Appendix 2) Court was deceived by respondents proposed order discused *supra*.

After ownership of stock or "property rights" thereto was completely adjudicated by "*settlement*" and discovery of fraud of the FCC broadcast licenses the instant complaint was filed in the United States District Court for the District of Nevada on July 1, 1988.

Respondents maintain *res judicata* in the following actions at law:

Respondents challenge petitioners' ownership of WFDR, Inc. stock and "rights" to broadcast licenses even after "*settlement*" *supra*.

The respondents argue the "Amended Plan of Reorganization of WFDR and Confirmation (no appeal perfected by petitioners) thereof bars the instant complaint. The argument erroneously emphasized the said amended plan expressly provided for transfer of WFDR's FCC licenses. The court rejected jurisdiction of FCC law *supra*, *res judicata* precluded.

Further, respondents argue the WFDR application to settle claims and order approving same bars the instant complaint, alleging $35,000 paid to petitioners' attorneys from sale of WFDR, Inc. assets redeemed petitioners' ownership or "property rights." The word "redeem or

redeemed" is not found in the said order. Respondents *animo* try to change the legal context of said order.

Applications *animo* were filed by respondents with the FCC, first application filed on or about April 29, 1981.

The second filing by respondents before the FCC was made July 16, 1981. Said fraudulent applications were filed some 60 days before the amended plan order of consumation was entered; *see Terry, Intent to Defraud*, 1915, 25 Yale L.J. 87, 94 -- *res judicata* not possible. Said applications and writings were of *damnum* to petitioners as discussed herein.

The FCC acknowledged with letter to petitioners dated August 14, 1981. (Appendix 9) One who has been permitted to intervene but denied the right to present evidence and examine witnesses and had his rights determined in a matter in which there was no evidentiary hearing has been denied due process; *In re Wildman*, 793 F.2d 157 (7 Cir. 1986).

Now respondents proffers the "Complaint to Compel Turnover of Property." In respondent Murphy's deposition (Record below), Attorney Joyce B. Klemmer, a member of the respondent law firm and representing Murphy at said deposition, made the following statement during the proceedings: "Mr. Whitehorn, on the record, what relevance does an FCC application have to do with your turnover proceedings?" Certainly, no *res judicata* claim here.

The trial court, the United States Bankruptcy Court, Northern District of Georgia, Newnan Division, Judge W. H. Drake, Jr. presiding, entered an order July 31, 1987. (Appendix 5) Said order is a complete judicial construction of the WFDR, Inc. bankruptcy case, all

adversary proceedings therein and all adversary proceedings filed in the petitioners' case in Nevada Bankruptcy Court. (All Nevada adversary proceedings were transferred to the Georgia Bankruptcy Court for adjudication.[11]

The respondents' mischaracterize the "Complaint to Compel Turnover of Property" as "an avoidance action" presumably since the said court, in the last paragraph of said order, granted a motion to bar the "Complaint to Compel Turnover" by statute of limitations pursuant to 11 § 549(d)(1). However, an action for fraud does not accrue until discovery of the fraud; *see Magna Leasing, Inc. v. Staten Island Mail*, 428 F. Supp. 1039, affirmed 563 F.2d 567. The substance of said order is the last decree entered by Judge Drake in the WFDR, Inc. case *supra*. **The mass of peremptory evidence mandates the doctrine of** res judicata **is inappropriate as a matter of law applied**

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[11] The July 23, 1980 adversary proceeding was resolved by the court's abstaining; final order entered January 26, 1984; *res judicata* precluded. WFDR, Inc. counterclaim validates no change in corporate stock ownership or FCC notification of same. Petitioners Jack and Mary Whitehorn granted relief October 6, 1980 (11 U.S.C. chapter 11); 11 § 362 in force date of said order; Garstin executed Ownership Report (FCC Form 323) certifying petitioner Jack Whitehorn 100% ownership of stock *infra*. December 8, 1980 adversary proceeding resolved by "*settlement*" which does not constitute a final decision on the merits as discussed *supra*. Therefore, no preclusive effect. Further, "*settlement*" is a contract as discussed *infra*. When a contractual right is terminated, the contract right is transformed into something else, or destroyed altogether; *see Schokbeto Indus., Inc. v. Schokbeton Prods. Corp.*, 466 F.2d 171 (5th Cir. 1972). The issues of the instant complaint and the bankruptcy proceedings respondents assert are totally different. The party asserting estoppel bears the burden of pleading and proving the identity of issues decided in the previous action. Preclusion was denied; *Little v. U.S.*, CA 9th 1986, 794 F.2d 484, 486-487. Not *res judicata* to instant complaint.

to the instant complaint. In further support of the evidence *de facto*, the said July 31, 1987 order expressly sets out:

> "The complaint . . . seeks the turnover under 11 U.S.C. § 542 of one hundred percent (100%) of the stock of WFDR, Inc. which is in the form of certificate No. 1 for 50 shares and certificate No. 2 for 5000 shares, as well as all assets said stock owns."

"Margaret H. Murphy and Law Firm of Smith, Cohen, Ringle, Kohler & Martin acted as attorneys for the corporate debtor-in-possession WFDR, and as estate administrator in WFDR's chapter 11 case. Smith Cohen, Ringle, Kohler & Martin is the predecessor law firm to defendant Smith, Gambrell & Russell."

Res judicata does not apply when the parties appeal in one action in a representative capacity and in a subsequent action in an individual capacity; *Clark v. Amoco Production Co.*, 794 F.2d 967, 973 (5th Cir. 1986).

The Court held: "Jack Whitehorn was the original sole shareholder of WFDR."

On October 6, 1980, the same date petitioners herein relief was ordered in the United States Bankruptcy Court for the District of Nevada, respondent Robert M. Garstin executed FCC Form 323 "Ownership Report" and on October 15, 1980 filed same pursuant to FCC directive dated July 21, 1980. The said form requires execution subject to "any person who willfully makes false statements on this report can be punished by fine or imprisonment; United States Code Title 18, § 1001 (formerly § 80)." The said ownership report set out:

"The only change involved is that licensee is now under the control of WFDR, Inc. debtor-in-possession, chapter 11, pursuant to order of United States Bankruptcy Court for Northern District of Georgia, Newnan Division."

Respondent Garstin was acting by and through proxy holder's authority included in the body of stock option agreement which subsequently was judiciously annulled through "*settlement*" as discussed *supra*.

Petitioner, owner of WFDR, Inc. stock, had by written document and verbal telephone conversation directed respondent Garstin to remove himself from the corporate property.

The said "FCC ownership report" certified to the FCC, pursuant to the preexisting ownership report *sine qua non* that petitioner Jack Whitehorn is owner and under full control through Garstin as elected officer and director.[12]

The Garstin control supposition is fraudulent. However, the FCC, within the premises set out

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[12] Parties whose rights are to be affected are entitled to be heard, it is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner"; *see Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L.Ed. 2d 62. Pursuant to Title 47 § 310, the FCC is precluded from considering third party as competing applicant for assignment . . . upon application to transfer permit if the permit continues to be valid; *see MG-TV Broadcasting Co. v. F.C.C.*, 1968, 408 F.2d 1257, 133 U.S. App. D.C. 54. The subject broadcast licenses were "valid" at time of fraud.

hereinabove, administratively granted WFDR, Inc. to WFDR, Inc. debtor-in-possession routinely.[13]

The Court further states in order of July 31, 1987: "Following approval by the FCC of the transfer of control of WFDR."[14]

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[13] The FCC retains continuing jurisdiction over broadcast license, despite chapter 11 proceeding; *see LaRose v. FCC*, 494 F.2d 1145 (D.C. Cir. 1974). Moreover, FCC license is not property of corporate debtor, not "property of the corporate estate"; *In re D. H. Overmyer Telecasting Co., Inc.*, 35 B.R. 400 (Bkrtcy. 1983). The fradulent application was filed with the FCC using "FCC Form 315," Application for Voluntary Assignment or Transfer of Control; FCC Rule § 73-3540(d). To complete the transfer the FCC required the licenses be returned from debtor-in-possession to WFDR, Inc. FCC Short Form 316, along with respondent Murphy's fraudulent writing at Appendix 11 was filed pursuant to FCC Rules § 73-3540(f)(4) which sets out "corporate reorganization which involves no substantial change in the beneficial ownership of the corporation." "Fraud" of the petitioner Jack Whitehorn's "property rights" to the apex. Respondents Murphy and Garstin fraudulently appeared before the FCC July 16, 1981 and removed, by writing and said FCC Form 316, WFDR, Inc. debtor-in-possession back to WFDR, Inc. pursuant to Title 18 § 1001. Said FCC form sets forth "Willful false statements on this form are punishable by fine and imprisonment." This FCC filing, in fact, removed the United States Bankruptcy Court, Northern District of Georgia, Newnan Division from the WFDR, Inc. case (*i.e.*, dismissal of the case) and certified same before the FCC, in total violation of said U.S.C. 18 § 1001 -- Thus allowing petitioner Jack Whitehorn's "property rights" to be assigned and transferred in the course of carrying out fraud under same cerification to U.S.C. 18 § 1001.

[14] The Court did not order or file any proceedings before the FCC. The said Court rejected jurisdiction of FCC matters *supra*. The respondents without any judicial authority and without any claim of "ownership rights" filed assignment and transfer application by and through "fraud." It is simple equity that a wrongdoer should disgorge his fraudulent enrichment; *see Dickson v. Patterson*, 1896, 160 U.S. 584, 16 S. Ct. 373 40 L.Ed. 543.

The gist of the complaint at bar: The assignment and transfer of the FCC broadcasting licenses, "A conferred property right," was consummated by and through "Fraud" of respondents herein (Complaint at Appendix 4). Respondents have no judicial authority to assign and transfer. (Murphy sworn deposition testimony record below) Murphy, Law Firm: Smith, Gambrell & Russell nor Garstin claim any ownership to said "property rights." (Deposition record below) Petitioner Jack Whitehorn "adjudicated by "*settlement*" owner of the "FCC property rights" (contract discussed *supra*) was not privy to any appearance before the FCC. See petitioner Jack Whitehorn's letter to FCC. (Appendix 10). Said letter and other correspondence by petitioner triggered a reply letter from FCC to petitioner Jack Whitehorn dated August 14, 1981. (Appendix 9)[15] The said letter set forth petitioner's writings were procedurally defective and considered as informal objections and cannot be *res judicata* in the complaint at bar.[16]

The FCC was not aware of the "fraud" set out *supra*, as well as petitioners' unawareness. The written instrument by the FCC peremptorily identified "ownership" and set out: "concerning your claims of ownership over WFDR, Inc. . . . the Commission will not defer action on assignment or transfer applications pending final resolution of disputed claims . . . Such claims must be settled privately or in a court of competent jurisdiction using local law."

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15 Under the parol evidence rule, the testimony by said letter is sanctioned; see *Schongalla v. Hickey*, 60 F. Supp. 814 (N.D.N.Y 1943).

16 Issue preclusion could not arise as to an issue that was not raised and thus was not decided; *Norfolk & Western Ry. v. U.S.*, C.A.D.C. 1985, 768 F.2d 373, 377-378, certiorari denied 107 S. Ct. 270, 479 U.S. 882, 93 L. Ed. 2d 247.

The ownership question had to be resolved before any formal and proper appearance before a tribunal could be litigated.[17]

The ownership or "property rights" were not final until "*settlement*" was entered by the court January 26, 1984. (See July 31, 1987 order at Appendix 5.)[18] *Res judicata* precluded.

The said July 31, 1987 order further set out: "The cancellation of the existing WFDR stock did not affect rights because Jack Whitehorn received in its place certificates of interest . . . It is true as Whitehorn argues, that the question of ownership of stock was ultimately decided in Jack Whitehorn's favor . . . It thus appears that **the orders in the WFDR case did not affect Jack Whitehorn's property rights.**" (Emphasis added.)

Respondent Garstin, *inter alia*, and by actions *supra* appeared before the FCC. Respondents Murphy and Law Firm: Smith, Gambrell & Russell by a fraudulent writing (at Appendix 11) wherein WFDR, Inc. debtor-in-possession was by fraud returned to WFDR, Inc., taken our of bankruptcy in the eyes of the FCC. Ownership 100% by petitioner Jack Whitehorn pursuant to FCC docket *supra*; licenses could not be assigned or transferred pursuant to statutes and rules of FCC set out herein. Fraud, "the significance of the act" was with full knowledge and without judicial authority as sworn to by

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[17] Petitioners could not file a plan of reorganization until "*settlement*" January 26, 1984 In a case involving corporate stock and claims by others, the court held the dispute must be settled before the reorganization; see *In re Burton Coal*, 126 F.2d 447 (7th Cir. 1942).

[18] A question cannot be held to have been adjudged before an issue on the subject could possibly have arisen; see *Third National Bank v. Stone*, 1899 19 S. Ct. 759, 760, 174 U.S. 432, 434, 43 L. Ed. 1035.

Murphy. (Deposition, record below) The said writing was filed with the FCC as part of an application to fraudulently assign and transfer "petitioners property rights," the FCC broadcast licenses -- the crux of the instant complaint.[19]

The constitutional privilege cannot be legislatively nullified, whether in bankruptcy or in any other situation; *Butcher v. Bailey*, 753 F.2d 465, 12 B.C.D. 943 (6 Cir. 1985) cert. dismissed 473 U.S. 925, 106 S. Ct. 17, 87 L. Ed. 2d 697 (1985). The privilege applies in bankruptcy as well as a broad range of other civil proceedings as well as in criminal matters; *McCarthy v. Arndstein*, 266 U.S. 34, 45 S. Ct. 16, 69 L. Ed. 158 (1924); *In re Martin-Trigona*, 732 F.2d 170, 11 B.C.D. 1010 (2 Cir. 1984).

CONCLUSION

For the reasons stated above, the complaint at bar cannot be barred by the doctrine of *res judicata*. If dismissal of action for insufficient service of process is correct as affirmed by the lower court, then further findings of fact and conclusions of law would be indecisive and *res judicata* estoped.

The lower court misapplied the general rules of *res judicata*, departed from traditional principles of statutory

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[19] The Federal Communications Commission is not strictly, a court but it has quasi-jurisdiction powers and its proceedings must satisfy the pertinent demand of due process; Title 47 U.S.C. § 151 *et seq*; *L. B. Wilson, Inc. v. Federal Communications Commission*, 83 U.S. App. D.C. 176, 170 F.2d 793. The FCC is an administrative agency of the Federal Government and it was held in *Melvin v. Penle*, 76 U.S. App. D.C. 154, 130 F.2d 423, 143 A.L.R. 149 that a cause of action for malicious prosecution or the malicious use of legal proceedings may be predicated upon the prosecution of an administrative proceeding. To the same effect, see *National Surety Co. v. Page*, 4th Cir. 58 F.2d 145.

interpretation and judicial review of Federal Agency Construction of Statutes.

To allow the instant case to stand as affirmed would open the door for all third-party applicants to encroach on any "valid FCC broadcast license" and interfere with the intent of Congress, a procedural right guaranteed by the due process clause; *U.S.C.A. Const. Amend 5.* Accordingly, because of the significant administrative law questions raised by this case and the importance to the Federal Communications Commission, certiorari should be granted; *see* __U.S.__, 110 S. Ct. 321, 107 L. Ed. 2d 311 (1989).

A writ of certiorari is meritorious in this instant case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certified that I have served the requisite number of copies of the foregoing Petition for Writ of Certiorari on:

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by placing same in the United States mail, first class postage prepaid, this 15 day of November 1990. I further certify that all parties required to be served have been served.

Jack R. Whitehorn